JD(ATL)–04–15
Las Vegas, NV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

NC-DSH, LLP d/b/a DESERT SPRINGS HOSPITAL MEDICAL CENTER

and **Case 28–CA–127971**

THERESA VAN LEER, an Individual

Fernando Anzaldua, Esq.,
for the General Counsel.
Thomas H. Keim, Jr., Esq.
(Ford & Harrison, LLP),
for the Respondent.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This case is before me on a July 31, 2014[1] complaint and notice of hearing (the complaint) stemming from an unfair labor practice charge that Theresa Van Leer filed on May 2 against NC-DSH, LLP d/b/a Desert Springs Hospital Medical Center (the Respondent or the Hospital), in connection with an unsuccessful organizing effort mounted by Service Employees International Union, Local 1107 (the Union).

I conducted a trial in Las Vegas, Nevada, on January 6 and 7, 2015, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

(1) Did Chief Executive Officer Sam Kaufman, on about March 8, solicit employee complaints and grievances and, explicitly or implicitly, promise employees better benefits and/or terms and conditions of employment if they rejected the Union as their collective-bargaining representative?

[1] All dates hereinafter occurred in 2014 unless otherwise indicated.

(2) Did Chief Nursing Officer Ellie McNutt, on about March 15, engage in that same conduct?

(3) Did the Respondent violate Section 8(a)(3) and (1) by suspending Certified Nursing Assistant (CNA) Van Leer from March 28 through April 8 because of a March 19 telephone conversation that she had with Tower 5 CNA Terri Fulton concerning how Tower 5 employees would vote in the election scheduled for March 20 and 21?

(4) Did the Respondent violate Section 8(a)(3) and (1) by issuing Van Leer a level 3 or final warning on April 8 for that same reason?

(5) At the March 28 meeting in which Van Leer was suspended, did Human Resources (HR) Director Yomi Fabiyi:

(a) Interrogate her about her union membership, activities, and sympathies?
(b) Create the impression that the Respondent was engaging in surveillance of her union activities by telling her that she had called other employees about the Union?
(c) Threaten her with unspecified reprisals because she engaged in union activities?

(6) On March 28, after Van Leer was suspended, did Carol Dugan, director of nursing, issue Van Leer an overly-broad and discriminatory directive or rule prohibiting her from discussing her terms and conditions of employment, including the suspension issued to her, with other employees?

(7) At the April 8 meeting in which Fabiyi issued Van Leer the level 3 warning, did he:

(a) Issue Van Leer an overly-broad and discriminatory directive or rule prohibiting her from discussing her terms and conditions of employment, including the discipline issued to her, with other employees?
(b) Threaten her with unspecified reprisals because she engaged in union activities?

The charge alleges that the Respondent (1) interrogated employees about their union activities and directed employees not to discuss their discipline with coworkers, and (2) discriminated against Van Leer by disciplining her due to her union activities. The last paragraph is the boilerplate language, "By these and other actions," the Respondent interfered with, restrained and coerced employees in violation of Section 7.

As a threshold matter, the Respondent contends that due process considerations should bar the following allegations because they were not raised in the charge or any amended charge:

(1) Kaufman's and McNutt's conduct; (2) Fabiyi's creating the impression of surveillance and threatening Van Leer with unspecified reprisals on March 28; and (3) Fabiyi's threatening her with unspecified reprisals on April 8.

The General Counsel at trial represented that the Region had sought to take statements from Fabiyi, Kaufman, and McNutt but the Respondent had failed to make them available, and contended that the "[b]y these and other actions" language in the charge encompassed the additional allegations.

The Supreme Court has held that a complaint may encompass any matter sufficiently related to or growing out of conduct alleged in a charge. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959); *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940).

In *Redd-I, Inc.*, 290 NLRB 1115, 1115–1116 (1988), the Board held that in deciding whether complaint amendments are sufficiently related to charge allegations, it would apply the "closely related" test comprised of the following factors:

> (1) Whether the untimely allegations involve the same legal theory as the allegations in the timely charge.
> (2) Whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge.
> (3) Whether the respondent would raise the same or similar defenses to both allegations.

In *Nickles Bakery of Indiana*, 296 NLRB 927, 927–928 (1989), the Board decided that this same "closely related" test should apply to the General Counsel's adding uncharged allegations to a complaint. The Board specifically overruled cases "holding or implying that the catchall 'other acts' language preprinted on the charge form provides a sufficient basis, on its own, to support any and all 8(a)(1) complaint allegations." Id. at 929. In this regard, the Board (Id. at 927 fn. 8) cited an earlier version of section 10064.5 of the General Counsel's casehandling manual, which was similar to the current provision that now reads:

> If the allegations of the charge are too narrow, not sufficiently specific or otherwise flawed, the charging party or its representative should be apprised of the potential deficiency in the existing charge and given the opportunity to file an amended charge. The charging party should also be advised that failure to file the amended charge may affect the Regional Office determination of the case and that any complaint can cover only matters closely related to the allegations of the charge.

The additional 8(a)(1) allegations concerning Fabiye regarded statements that he made during his meetings with Van Leer on March 28 and April 8, at which the Respondent allegedly suspended and disciplined her in violation of Section 8(a)(3). Moreover, some of the interrogation alleged in the charge related to Fabiye's statements at the March 28 meeting. Accordingly, I conclude that these allegations arose from the same factual circumstances or

sequence of events as the allegations contained in the charge and that the General Counsel has met the "closely related" test.

On the other hand, nothing in the charge would have provided the Respondent with any kind of reasonable notice that Kaufman and McNutt were alleged to have committed any violations of the Act. Their solicitation of grievances and promise of benefits in meetings with employees was not part of the res gestae of the 8(a)(3) actions that the Respondent took against Van Leer, did not involve the same 8(a)(1) conduct as that alleged in the charge, and did not take place at the same time as the alleged 8(a)(1) conduct.[2]

Although the General Counsel did seek to take their statements, there is no evidence that the Respondent was provided with any specifics of the unpled allegations against them. In these circumstances, the General Counsel should have had Van Leer submit an amended charge as per section 10064.5 of the casehandling manual.

Accordingly, I find that the allegations pertaining to Kaufman and McNutt did not meet the "closely related" test and therefore were not properly part of the complaint. Because this determination could be reversed on appeal, I will go ahead and discuss the facts relating to these allegations and decide how I would rule on them were they appropriately before me.

Witnesses

The General Counsel called Van Leer and, as adverse witnesses under Section 611(c): Fabiyi, Kaufman, and McNutt, as well as Colleen Murphy, director of interventional services, and Jeanne Schmid, vice president, labor relations for Universal Health Services (the Hospital's parent company, apparently aka Valley Health System).

The Respondent called Wayne Cassard, assistant director of HR for Valley Health System.

Nursing Director Dugan, an admitted agent of the Respondent, was present in the meetings that Van Leer had with Fabiyi on March 28 and April 8. Yet, the Respondent did not call her to corroborate Fabiyi's versions or deny Van Leer's versions of what was said therein.

The sole basis for Van Leer's suspension and discipline was what she said in the one telephone conversation with Fulton on March 19. Accordingly, Fulton's absence as a witness leaves a serious evidentiary hole in the record. We do not have her firsthand account of that conversation; whether she would confirm or dispute Van Leer's testimony that they typically use the term "fuck" or variations thereof in conversing; and whether, as suggested by Murphy's March 26 email to Fabiyi and by Van Leer's hearsay testimony, she was pressured by other employees to make the complaint, causing or contributing to her being visibly upset when she reported the conversation on March 19.

[2] The General Counsel has not contended that the Respondent engaged in "an overall plan to resist the warranted.

Our system of jurisprudence has what is called the "missing witness rule," which provides that:

> Where relevant evidence which would properly be part of a case is within the control of the party whose interest it would normally be to provide it, and he fails to do so without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him. 29 Am. Jur.2d §178.

Normally, it is within an administrative law judge's discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent and thus within its authority or control. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); see also *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *Underwriters Laboratories Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998) ("The decision to draw an adverse inference lies within the sound discretion of the trier of fact"). In that event, drawing an adverse inference regarding any factual question on which the witness is likely to have knowledge is appropriate. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem 861 F.2d 720 (6th Cir. 1988).

Clearly, the Respondent's failure to call Dugan, a managerial employee, leads to an adverse inference that her testimony would not have supported Fabiyi's versions of the conversations that he had with Van Leer in the meetings of March 28 and April 8.

The issue of whether an adverse inference should be drawn for Fulton's failure to be present—and, if so, against whom—is more problematic because she was and remains a rank-and-file employee. The General Counsel and the Respondent disagree as to which party should suffer an adverse inference by virtue of Fulton's nonattendance at the trial.

The General Counsel issued subpoenas for Fulton's attendance,[3] although there is no proof of service, but declined at the conclusion of the trial to move for a continuance to seek subpoena enforcement. However, I believe that in the circumstances of this case, the Respondent bore the burden of presenting Fulton, or at least showing that it made a bona fide but unsuccessful effort to do so.

As the above cases indicate, the key in determining whether an adverse inference should be drawn against a party for not calling a witness is whether the witness could reasonably be expected to corroborate its version of events, as reflected by the language "particularly when the witness is the party's agent and thus within its authority or control." In other words, the witness does not necessarily need to be an agent and within the party's authority or control.

Thus, in *Ready Mix Concrete Co.*, 317 NLRB 1140, 1141–1142 (1995), Judge Mary Cracraft drew an adverse inference against the respondent-employer when it did not call quality control personnel to corroborate a supervisor's account of an incident over the dischargee's version. In *DPI New England*, 354 NLRB 849, 858 (2009), Judge Paul Bogas suggested an

[3] GC Exhs. 11, 13. The latter was erroneously a subpoena duces tecum.

adverse inference against a respondent-employer for its failure to call any individuals who had purportedly complained against the dischargee (two of them were current supervisors, but the others were not).

Finally, in *Associated Builders, Inc.*, 2001 WL 1589691 (2001), Judge Thomas Patton applied the adverse inference rule against the respondent-employer for its failure to call an employee whose purported complaint to a supervisor was one of the reasons that the alleged discriminatee was terminated. Although the decision is not precedential, I find it rationally persuasive.

Here, the General Counsel did not need to rely on Fulton's testimony to establish a prima facie case. On the contrary, the Respondent's suspension and discipline of Van Leer was based solely on what Fulton told management witnesses about the March 19 phone conversation; if she had not corroborated their testimony thereon, the Respondent's defenses would have collapsed. Simple logic dictates that the Respondent would have wanted Fulton to testify to substantiate management representatives' accounts of what she told them, and to rebut any contrary testimony of Van Leer. I note that management did not take a sworn statement from Fulton or even have her write down a report of the conversation.

Accordingly, I draw an adverse inference against the Respondent for failing to call Fulton or showing that it sought unsuccessfully to secure her presence. In the event that higher authority disagrees with my conclusion that an adverse inference is warranted in these circumstances, my credibility resolutions remain the same for the reasons stated below.

Credibility

At the outset, I note the well-established precept that a witness may be found partially credible; the mere fact that the witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Id. at 798–799; see also *MEMC Electronic Materials,* 342 NLRB 1172, 1183 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997); *Excel Container,* 325 NLRB 17 fn. 1 (1997). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2nd Cir. 1950), regarding witness testimony, "[N]othing is more common in all kinds of judicial decisions than to believe some and not all."

The management representatives (Cassard, Fabiyi, and Murphy) involved in the events surrounding Van Leer's suspension and termination were not fully credible, for the following reasons.

Fabiyi was not believable on several critical points because portions of his testimony were contradicted by management documents, including those he prepared; inconsistent with Cassard's testimony; or implausible. Moreover, the notes that he took of what Van Leer stated in his meeting with her on March 28, do not match his undated memorandum of such.[4]

[4] Compare GC Exhs. 4 and 6.

Perhaps most suspiciously, he offered no explanation of why he asked neither Fulton nor Van Leer to give signed written statements, even though he testified that it is normal policy to ask for such and then make notes in lieu of a written statement only if the employee will not give one. In this regard, on cross-examination, Cassard first testified that he did ask Fabiyi to take a written statement from Fulton but then patently back-tracked, diminishing my faith in the reliability of his testimony as well. Fabiyi's failure to ask for such statements is particularly suspect in light of the following. The Respondent had hired management consultants specializing in the National Labor Relations Act (NLRA) to run its preelection campaign to remain union-free, and they conducted training of management/supervisors on what they could say and do to employees within the parameters of the Act. When Murphy first saw Fulton, she saw fit to call in Andrew Capp, one of those consultants. As later discussed, Murphy was inconsistent and equivocal in giving the reason why she did this. In the absence of another valid explanation, it must be concluded that she did so because the incident was connected to the union organizing drive, especially when Capp had a second consultant attend the meeting. Accordingly, I would expect that Fabiyi would have realized the importance of gathering solid evidence (to wit, signed written statements) in a situation where an employee might be disciplined for engaging in union activity.

I further note that nothing in Fabiyi's or Van Leer's testimony, or in Fabiyi's notes, reflects that at the March 28 meeting, Fabiyi asked Van Leer anything about her approaching Fulton on March 20. Yet, Cassard testified that this was conduct that was considered in deciding on the level 3 discipline.

When I asked Fabiyi if the subject of the Union came up at all in his March 28 meeting with Van Leer, he unequivocally answered no, but this is contradicted by (1) the March 20 memorandum that Schmid had provided him before this meeting stating that "Terri reported that Theresa indicated that she was very upset that Terri was not going to vote for the union";[5] and (2) Fabiyi's notes of his March 25 interview with Fulton, the first lines of which included what purports to be Fulton's statement that Van Leer said, "What do you mean no to the vote?"[6]

Also as to the March 28 meeting, Fabiyi testified that he did not raise, as an allegation, Van Leer's threat to other employee to "kick your ass."[7] Indeed, he testified that the term never came up at all. However, consistent with Van Leer's testimony to the contrary, the first paragraph of his undated memorandum of the meeting includes the statement, "She denied threatening to beat anyone's ass."[8] Clearly, a denial presupposes an accusation, and to claim that there was no inconsistency because "kick your ass" is different than "beat your ass" would be disingenuous.

Cassard, too, was not entirely credible. As stated above, he first testified that he asked Fabiyi to take a written statement from Fulton but then apparently deliberately retreated from that testimony. Moreover, he incredibly testified on cross-examination that he did not recall if

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5 Jt. Exh. 5.
6 GC Exh. 4 at 1.
7 Tr. 118.
8 GC Exh. 6.

Fabiyi had informed him that the phone conversation between Fulton and Van Leer related to the Union. This testimony was directly contradicted by his testimony that he reviewed the language contained in the level 3 discipline prior to it issuance on April 8. The incident report therein expressly refers to Van Leer's having expressed her views in support of the Union in the phone call. After the General Counsel showed him the incident report, Cassard professed to have had his memory refreshed that the phone call had dealt with the Union.

Murphy appeared disinterested. She professed lack of recollection on numerous points, lending doubts to her reliability as a witness. Further as I noted above, she was contradictory on why she called Labor Relations Consultant Capp in to attend the meeting she had with Fulton, offering different reasons during the course of her testimony of why she did so: To see if he could help figure out how to handle the situation; to help her with the situation; to merely serve as a witness (at odds with her testimony that he was the one who spoke to Fulton and that she listened); because Fulton was very upset.[9] Capp was not called as a witness, and Schmid, who was also present, did not offer any details concerning his role. Based on Murphy's inconsistent testimony thereon, I cannot find as a fact the purpose of his being called or the nature of his participation. I do find that Murphy's fluctuating testimony undermined her credibility.

Another aspect of Murphy's testimony further diminished her credibility. Murphy testified that she first became aware of the phone call when Fulton told her about it, 5 minutes after it occurred, and that no other employees approached her about the conversation. However, Murphy's email to Fabiyi on March 26, states that "[Fulton] was very upset and ended the call when I made eye contact with her" and that "[s]hortly thereafter the HUC [hospital unit coordinator or floor secretary] came to me and asked me to speak with the CNA [Fulton] that was so upset."[10] After the General Counsel pointed this out to Murphy, she professed that she had no independent recall thereof or of whom the HUC was that day. Murphy's evasiveness on this matter—in the absence of any testimony from Fulton—causes me to wonder whether Fulton came to report the incident on her volition or was pressured by other employees to do so. I note that Fabiyi's notes reflect that Fulton stated that she had related the call to two coworkers, and they informed Murphy.

I also have to wonder why Murphy did not stop to talk to Fulton when she allegedly observed her being "very upset" when she was on the phone with Van Leer. That would certainly have been the normal reaction one would expect of a manager encountering such a situation.

I do credit Murphy's testimony, as corroborated by Schmid, who was credible, that Fulton was upset at the March 19 meeting. However, whether this was the result solely of the phone call or in part also due to being coerced by other employees into complaining cannot be answered from this record. In any event, I cannot find that Murphy provided a reliable account of who initiated her meeting with Fulton.

Kaufman and McNutt testified only as to independent 8(a)(1) allegations concerning Van Leer. They, too, were not fully credible. The credibility of their testimony must be evaluated in

[9] Tr. 179–182, 189.

[10] GC Exh. 3 at 1.

the context of the Hospital's organized campaign against unionization, as reflected by its hiring of outside consultants specializing in the NLRA and the training that they gave to managers and supervisors as to what they could say and do. Viewed in this light, I find suspicious Kaufman's testimony that he could not recall keeping the notes that he took as he went around asking employees their concerns, or what he did with them. Similarly, I do not credit McNutt's testimony that she conducted small group meetings with employees sua sponte and with no direction from anyone else, and that she had no discussions with other managers or supervisors about how to conduct them. Allowing McNutt free rein to speak to employees as she chose would have been wholly inconsistent with the Hospital's systematic campaign approach.

Moreover, Kaufman seemed noticeably uncomfortable, almost defensive, and had a sketchy recall in general about the small group meetings that he held with employees during the organizing campaign. Furthermore, although he testified that he could not recall if he wrote down the names of employees who raised concerns, he also testified that if he later ran into such employees, he shared information with them if he could. Since he conducted "many such meetings" on all the floors, I can only wonder how he remembered who had said what.

In any event, neither Kauffman nor McNutt could specifically recall speaking to Van Leer, and they therefore were not able to specifically rebut the statements that she attributed to them.

Turning to Van Leer, one aspect of her testimony were not plausible: Her denials on cross-examination that she called Fulton because she was upset about Tower 5 employees talking about not voting for union representation, or that she wanted Fulton and the other employees who worked there to vote yes. Her own testimony of what she said to Fulton leaves no doubt that her purpose in making the phone call was related to her desire to have coworkers, including Fulton, vote for the Union. Nevertheless, Van Leer answered questions readily and without hesitation, was reasonably consistent throughout her testimony, and made no efforts to deny using profanities in her conversation with Fulton. Accordingly I generally credit her over Fabiyi and Murphy, whose testimony was replete with numerous flaws.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, written and oral stipulations, and the thoughtful posttrial briefs that the General Counsel and the Respondent filed, I find the following.

The Respondent, one of five hospitals owned and operated by Universal Health Services aka Valley Health System, is a limited liability company that operates a hospital and medical center in Las Vegas, Nevada. The Respondent has admitted jurisdiction as alleged in the complaint, and I so find.

In approximately late 2012, the Union began an organizing drive at the Hospital, and it later filed a petition to represent approximately 230 employees in a unit composed of all full-time, regular part-time and per diem CNAs, various classifications of technicians, and physical

therapy aides. An election conducted on March 20 and 21 resulted in a majority of employees voting against representation.[11]

Between January and March, the Respondent conducted formal and informal meetings with employees, to discuss the Union, the union organizing campaign, and/or the election, in an effort to convince employees to vote against representation. In this regard, the Respondent employed outside labor relations consultants specializing in the NLRA to manage its campaign, as part of which they instructed managers and supervisors training on what they lawfully could say and do.

Kaufman and McNutt were among the various managers and supervisors who conducted informal meetings with small numbers of employees on the floors. Van Leer participated in two such meetings. I credit her unrebutted accounts of them as follows.

On about March 8, in the morning, Van Leer was in a hallway with three other CNAs when Kaufman approached. He proceeded to give them reasons why he felt that they should vote no in the election; along the lines that the Union could not help them, union promises could not be believed, and the Hospital could help them with their concerns. He asked if they had any concerns or issues that needed to be addressed. Van Leer replied that her problem was the pay and asked why the Hospital's CNAs were the lowest paid in the Las Vegas area. Kaufman wrote down her name on the notepad that he was carrying and said that he would investigate her claim and get back to her. He never did so.

On about March 15, in the afternoon, Van Leer was with another CNA in a hallway when McNutt approached. She said that she wanted to talk to them about the Union and if they had any concerns that needed to be addressed. Van Leer responded that she had already talked to Kaufman about the money issue. McNutt replied that this had already been brought to her attention and to give the Hospital a chance to fix the problem; they did not need a union to fix their problems.

During the course of the union organizing campaign, Van Leer attended union meetings and discussed unionization with other employees, as well as gave other employees authorization cards to sign. On March 19, while not at work, she received a phone call from a Tower 5 employee that Tower 5 employees were essentially talking about voting against the Union in the election scheduled to begin the next day. Van Leer already had Fulton's cell phone number and called her at about 5 p.m. The conversation lasted a couple of minutes and ended when Murphy walked by Fulton's desk.

It is clear from Van Leer's candid description of the language that she used in the phone call that she was very upset, indeed agitated at hearing this rumor. Thus, she said almost immediately (not necessarily verbatim):[12]

> [W]hat the fuck is this I'm hearing that everybody is saying—I got a call that . . . everyone on Tower 5 wants to everyone to get together and wait a year to see

[11] See Jt. Exh. 2.

[12] Tr. 213–214.

what the hospital do [sic], and then unionize again. . . . I'm so sick of hearing this mother fucking shit. I just want it all to be over.

I credit Van Leer's testimony that she did not know that Fulton was at work until the end of the conversation, when Fulton said that Murphy was at her desk, over hearsay evidence that Fulton told her she was at work at the start of the phone call. The same holds true for the contents of the conversation. What Fulton related to management is another matter and will be addressed subsequently.[13]

Based on Murphy's March 26 email and Fabiyi's notes of what Fulton told him on March 25, and my not finding Murphy's testimony credible on point, I find that Fulton was not the first employee to tell Murphy about the telephone conversation that she had with Van Leer. The identity of that individual or individuals remains unknown, as does the nature of any conversation he/she/they had with Murphy.

Shortly after the phone conversation, Fulton went to Murphy's office, where she met with Murphy, Schmid, and Labor Relations Consultants Capp and Jose (last name unknown). None of the individuals who attended the meeting offered testimony concerning the contents of what Fulton reported. On 611(c) examination, Murphy and Schmid testified only about Fulton's state of mind, and neither Fulton nor either of the two labor relations consultants were witnesses.

The next morning, Van Leer saw Fulton as they were going into work. The step 3 discipline issued to Van Leer was, by its express language, based solely on the March 19 telephone conversation. Accordingly, I need not describe their interaction that day or thereafter.

On about March 20, Schmid prepared an email describing the meeting, and she sent it to Fabiyi.[14] Fabiyi met with Fulton and Murphy on March 25, in his office, where he presented the email to Fulton. He asked her to review it and annotate any changes, which she did.[15] She wrote in "did not say" by the statements that Van Leer had called her, "You mother-fucking bitch," "I/We will beat your ass," and "You bitch, you're gonna pay." She also added the sentence that she had answered her cell phone because she was expecting a phone call from her mother-in-law, whose name is Theresa. She then signed the document.

Fabiyi also asked Fulton to describe the conversation, and he took notes of what she said.[16] Again, I am at a loss as to why he did not take a full written statement from her. The two pages of notes, handwritten and double spaced, are more summary in nature than a complete rendition. There is no indication of what, if any, statements were in direct response to questions that Fabiye asked. The notes indicate that Van Leer started the phone conversation with, "Girl what the fuck is going on there? What do you mean no to the vote? Tell them mother fuckers you need to get it right." There is no other mention of Van Leer using obscenities. The notes

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13 Such statements are hearsay and therefore cannot go to the truth of the matter asserted. They are admissible as far as going to the issue of what was reported to management.

14 Jt. Exh. 5.

15 Jt. Exh. 6.

16 GC Exh. 4.

also reflect that Fulton reported the conversation to two coworkers, who informed Murphy, and that Fulton felt threatened (although no reason why is given).

On March 26, Fabiyi requested that Murphy send him an email describing her discussion with Fulton on March 19.[17] I find this peculiar since he had already interviewed Fulton, the only individual other than Van Leer who could offer direct testimony about the contents of their conversation. Murphy complied.[18]

Van Leer's suspension

Fabiyi made the decision to suspend Van Leer, after consulting with Cassard. On March 28, he met with Van Leer and Dugan in his office. I credit Van Leer's account over Fabiyi's because Fabiyi was not a reliable witness, the Respondent did not call Dugan to corroborate his testimony, and Van Leer was generally more credible than he was.

As with Fulton, Fabiyi chose not to ask Van Leer to give a full written statement, and he again instead took rather summary notes of what she said, with no indication of any questions that he might have asked.[19]

I find the following. When Van Leer went into his office, Fabiyi told her that he needed her badge because she was being suspended. She asked why, and he replied that she was under investigation because she had called several employees and told them that she was going to kick their asses if they did not see her views about the Union. She asked who had said that, and he replied that he was not at liberty to say. She denied talking to anyone other than Fulton, but he replied no, they had several complaints against her.

I credit Van Leer's testimony above over Fabiye's testimony that she sua sponte volunteered that she called only Fulton. Most importantly, Van Leer's version is supported by an undated memorandum of the meeting that Fabiye prepared, which states in the first paragraph, "She denied threatening to beat anyone's ass."[20] Moreover, his notes of what she said at the meeting strongly suggest that he questioned her about calling other employees. Thus, most of the notes address Van Leer's contacts with other employees, and close to their end, there is the statement, "No, I didn't call anyone else or call anyone a snitch."[21]

Fabiye asked her about the conversation with Fulton, and she replied that it was about the Union. When he asked for the specifics of the conversation, she responded that it was private and not his business.

Fabiye told her that she needed to be removed from the building because they took threatening somebody very seriously. Van Leer asked if it was such a serious threat, why had she not been removed from the building on March 20. Fabiye indicated that he had a backlog of

17 GC Exh. 3 at 1–2.
18 Id. at 1.
19 GC Exh. 5.
20 GC Exh. 6 at 1.
21 GC Exh. 5 at 4.

paperwork. He also told her not to discuss with anyone else what they were discussing in the meeting, including the suspension, or "it will be trouble for you."[22]

Van Leer asked him to confirm that the charge against her was that she called several people and said she was going to kick their asses, because she felt as though Kaufman and McNutt were lying about her, and she did not want them to come back with another charge. Fabiyi said yes and that if she had not done do so, she would be paid for the time she missed as a result of the suspension. Fabiyi did not give her a fixed duration for the suspension but told her that once the investigation was completed, he would call her.

Dugan escorted Van Leer out of Fabiyi's office. She told Van Leer to calm down and said that when they got back to the floor, Van Leer should get her personal belongings and leave, not stand around and talk about "what was going on,"[23] because she was being suspended. Dugan tried to reassure Van Leer by saying that if the allegations against her were untrue, she did not have to worry.

The Respondent's discipline policies

The Respondent's discipline policies are contained in HR policies 601 and 602,[24] HR 601 sets out various types of misconduct that may result in preventive counseling, written warning, final warning, suspension, and/or immediate employment termination. The first of these, and the one pertinent is:[25]

> Disruptive behavior including but not limited to verbal or physical abuse/threats, intimidating, swearing, or coercing behavior directed toward (or in the presence of) a patient, visitor, contracted personnel or facility employee or any behavior which disrupts or interferes with patient care, another staff member's work performance, or creates a non-productive work environment.

HR 602 provides guidelines for discipline designed to achieve a change in an employee's behavior, conduct, or work performance. It sets out a progressive discipline system by providing for four levels of corrective action, with the caveat that certain behaviors may be considered so serious in nature that termination is the appropriate outcome: Level 1, initial discussion (verbal warning); level 2, performance improvement plan (PIP), a written warning; level 3, final (written) warning; and level 4, termination. Level 2 should be utilized if the employee's performance or behavioral problems continue after the verbal warning, and level 3 should be utilized if the employee's performance or behavioral issues have continued after the PIP or if the employee refused to sign the action plan.

22 Tr. 237.
23 Tr. 239.
24 Jt. Exhs. 3, 4, respectively.
25 Jt. Exh. 3 at 2.

The policy further states that the following may be considered in determining what level should be selected:

Severity of the incident
Frequency of the Incident
Previous overall performance/behavior
Tenure of the employee
Mitigating circumstances
Commitment of the employee to the overall corrective action/PIP.

Van Leer's level 3 warning

Fabiye conducted no further investigation after his March 28 meeting with Van Leer, and the only action he took thereafter was to discuss with Cassard the discipline to impose. As with the suspension, they jointly made the decision on the discipline that Van Leer received on April 8. Cassard reviewed and approved the language of the written warning prior to its issuance.

Cassard and Fabiye did not offer a consistent credible account of how and when they arrived at a level 3 warning . Thus, both were suspiciously vague about the communications that they had with each other regarding the matter. They also contradicted each other concerning whether her past performance was considered in deciding on that level of discipline. Finally, Cassard testified that Van Leer's approaching Fulton in the parking lot on March 20 was a factor, but Fabiye said nothing about it being a consideration, and the warning itself mentions only the March 19 phone call.

Fabiye called Van Leer on April 7 and asked her to come to his office. She did so the following evening. Dugan was also present. For reasons already stated, I credit Van Leer's version of what was said, rather than Fabiye's, as follows. I note that Fabiye did not specifically deny telling Van Leer not to discuss her discipline with other employees.

Fabiye told Van Leer that other employees had been terminated for the exact same reason but that she was being given a level 3. She asked why. He replied because she had called Fulton and used abusive language and profanity. Van Leer pointed out that this was not with what she had initially been charged: Calling several employees and saying that she would kick their asses if they did not see her views. She asked why he called her language abusive because her cursing had not been directed toward Fulton or anyone else. She further said that she was home on her own time. He replied that she should have asked Fulton where she was, whether she was at work. Van Leer replied no, that Fulton should have told her if she could not talk. Van Leer added that she found out that Fulton was at work only at the end of the conversation.

Van Leer and Fabiye got into a heated exchange after Van Leer refused to sign the warning, and Fabiye told her that she could not get a copy. During the course thereof, he also told her not to discuss her level 3 with coworkers, or "it could be trouble for you."[26] Van Leer accused him of telling her not to discuss it because he knew that it was a bogus charge made up by Kaufman and McNutt because of her support for the Union. She asked if she would be paid

[26] Tr. 242.

for the time that she was suspended, and he replied no. He also stated that she would be issued a corrective action plan.

The incident report in the level 3 warning that she received[27] cited HR policy 601 (employee conduct and work rules) and stated:

> You displayed disruptive behavior that included profane and abusive language that was directed toward a hospital employee while the employee was at work and on duty. While we respect your right to express your views related to union organizing, it is not appropriate and in violation of our policy to do so using profane and abusive language.

Van Leer returned to work on April 10. She never received a corrective action plan. In response to the General Counsel's subpoena duces tecum, the Respondent provided, inter alia, a level 3 discipline issued to another CNA on June 9 for engaging in a verbal confrontation with a coworker in the presence of other coworkers.[28] Unlike Van Leer, she had previously received a level 2 warning in December 2013, concerning her behavior.

Analysis and Conclusions

Preelection statements by Kaufman and McNutt

The Board has recognized that "generalized expressions of an employer's desire to make things better have long been held to be within the limits of campaign propaganda." *MacDonald Machinery Co.,* 335 NLRB 319, 319 (2001); see also *National Micronetics, Inc.*, 277 NLRB 993, 993 (1985) (employer's generalized request for "another chance" and "more time" did not violate Section 8(a)(1)). Such statements can be distinguished from promises of improvements in specific terms and conditions of employment. See *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. 4 (2014).

Fundamentally, such statements found lawful are not in the context of solicitation of employee grievances or complaints. As to the solicitation of grievances, the Board stated in *Traction Wholesale Center Co.*, 328 NLRB 1058, 1058 (1999), citing *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972):

> When an employer undertakes to solicit employee grievances during an organizational campaign, there is a "compelling inference," which the Board can make, that the employer is implicitly promise to correct the grievances and thereby influence employees to vote against union representation. Such conduct violates the Act.

In connection with the solicitation of grievances, a statement indicating that the employer is "looking into" making changes desired by employees indicates that action is being

[27] GC Exh. 7. The March 8, 2014 dates by Fabiyi's and Dugan's signatures were errors.

[28] GC Exh. 8.

contemplated and constitutes an implied promise of improvements. *Purple Communications*, supra, 361 NLRB No. 43 at slip op. 4.

This inference is "particularly compelling" when, prior to the union's organizing campaign, the employer has not had a previous practice of soliciting grievances. *Garda CL Great Lakes, Inc.*, 359 NLRB No. 148, slip op. 1 (2013), citing *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), enfd. 165 Fed. App. 435 (6th Cir. 2006).

Here, the Respondent failed to provide evidence that prior to the Union's organizing campaign, it ever engaged in a practice of soliciting employee grievances or complaints. Indeed, the two conversations in question occurred less than 2 weeks before the scheduled election.

Before soliciting employee grievances, Kaufman told employees that the Hospital, but not the Union, could help them with their concerns, and after Van Leer complained about pay, he told her he would investigate her claim and get back to her. After McNutt solicited grievances and Van Leer raised the money issue, McNutt replied that this had already been brought to her attention and to give the Hospital a chance to fix the problem; the employees did not need a union to help them fix their problems.

In the above circumstances, I conclude that, if allegations were properly before me, the Respondent, through Kaufman and McNutt, violated Section 8(a)(1) by soliciting employee complaints and grievances and promising, either explicitly or implicitly, to remedy them during a union organizing campaign.[29]

Allegations concerning statements on March 28

(1) Fabiye interrogated Van Leer about her union activities and sympathies.

The test for determining whether questioning of an employee violates Section 8(a)(1) of the Act is whether it would reasonably tend to coerce employees in the exercise of their Section 7 rights. *Grand Canyon University*, 362 NLRB No. 13 slip op. 1 (2015), citing *Hanes Hoisery, Inc.*, 219 NLRB 338, 338 (1975).

Fabiyi told Van Leer that she was under investigation because several employees had complained that she had called and told them that she was going to kick their asses if they did not see her views about the Union. Inasmuch as he was presumably investigating these, due process dictated that he give her an opportunity to present her versions of what she had said. I see no coercion in this and therefore recommend that the allegation be dismissed. See *Fresenius USA Mfg. Inc*, 358 NLRB No. 138 slip op. 4 (2012) (Employer may appropriately question employees about facially valid claims of harassment and threats, even if that conduct took place during the employees' exercise of Section 7 rights); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528–529 (2007).

[29] Kaufman's statement to employees that the Union could not help them might be construed as another word of saying that it would be futile for them to select the Union as their representative. However, it is essentially subsumed by his conduct in soliciting grievances.

(2) Fabiye created an impression of surveillance of Van Leer's union activities by telling her that they knew she had called other employees about the Union.

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that her union activities had been placed under surveillance. *Fred'k Wallace & Son, Inc.*, 331 NLRB 914, 914 (2000); *Tres Estrellas de Oro*, 329 NLRB 50, 50 (1999). An employer creates such an impression by indicating that it is closely monitoring the degree of an employee's union involvement. *Flexisteel Industries, Inc.*, 311 NLRB 257, 257 (1993); *Emerson Electric Co.*, 287 NLRB 1065, 1065 (1988).

As stated above, the alleged complaints involved telephone calls, and I do not know how the Respondent could have engaged in surveillance of telephone calls unless it had conducted (presumably illegal) wire-tapping, of which there is no evidence in the record. Telling Van Leer that several employees had complained about her carries no connotation that the Hospital was monitoring her union activities. Accordingly, I recommend dismissal of this allegation.

(3) Fabiye threatened Van Leer with unspecified reprisals because she engaged in union activities.

This relates to Fabiye's statement that Van Leer should not discuss anything they said in the meeting, including the suspension, with anyone else, or "it will be trouble for you."

His statement was not a threat of unspecified reprisals because she engaged in union activities. However, the principle is well established that an employer violates Section 8(a)(1) when it prohibits employees from speaking to coworkers about disciplinary investigations or discipline they have received. See *Fresenius USA Mfg., Inc.*, above at slip op. 1 fn. 1; *Bryant Health Center, Inc.*, 353 NLRB 739 (2009); *SNE Enterprises, Inc.*, 347 NLRB 472 (2006). The Respondent does not assert any confidentiality considerations that might outweigh Van Leer's right to discuss her suspension or disciplinary investigation with other employees, so that narrow exception to the general rule is not applicable. See *Caesar's Palace*, 336 NLRB 271 (2001).

I therefore conclude that Fabiyi violated Section 8(a)(1) by prohibiting Van Leer from speaking to coworkers about her suspension or the investigation.

(4) Dugan issued an overly-broad and discriminatory directive or rule prohibiting Van Leer from discussing terms and conditions of employment, including discipline issued to her.

The legal framework is set out above. The facts do not support this allegation. Dugan simply told Van Leer to gather her personal possessions and leave the facility now that she was under suspension (and no longer on duty) and not "stand around talking." Dugan did not say that Van Leer could not talk to other employees about her suspension after she left the premises or when she returned to work status. Accordingly, I recommend that this allegation be dismissed.

Allegations concerning Fabiye's statements on April 8

(1) Fabiye issued an overly-broad and discriminatory directive or rule prohibiting Van Leer from discussing her terms and employment, including discipline issued to her.

(2) Fabiye threatened her with unspecified reprisals because she engaged in union activities.

These allegations relate to Fabiye's statement that Van Leer should not discuss her level 3 discipline with coworkers, or "it could be trouble for you."

This was a statement, rather than a directive or rule, and it did not threaten her with unspecified reprisals because she engaged in union activities. However, I do conclude that Fabiye violated Section 8(a)(1) by prohibiting Van Leer from speaking to coworkers about the discipline that she received. See the cases that I cited above.

Van Leer's suspension and final written warning

The starting point for determining the lawfulness of the Respondent's imposition of an unpaid suspension and level 3 warning against Van Leer is which legal framework is appropriate: *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the general analysis used in cases of alleged unlawful discrimination; or the analysis set out in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), used when there is no question that the employer's actions stemmed from the employee's protected activity.

Wright Line

Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

If the General Counsel makes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. Once this is established, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected

conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

Should the employer's proffered defenses be found pretextual, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

Atlantic Steel

When a respondent-employer defends disciplinary action based on employee misconduct that is part of the res gestae of the employee's protected activity, the Board typically analyzes the case under the four-factor test set forth in *Atlantic Steel Co.*, above. *Fresenius USA Mfg., Inc.*, above at slip op. 5 (2012); *Aluminum Co. of America*, 338 NLRB 20, 22 (2002); *Atlantic Steel Co.*, 245 NLRB 814 (1979). See also *Lou's Transport, Inc.*, 361 NLRB No. 158 (2014); *United States Postal Service*, 360 NLRB No. 74 (2014). The rationale behind this is that there is an assumed causal connection between the protected activity of the employee and the discipline, and the pivotal issue is whether the employee's conduct was removed from the Act's protection. *Aluminum Co. of America,* id.; *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 5 (2011); *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003).

An *Atlantic Steel Co.* analysis considers four factors and weighs them in the aggregate to determine whether the employee's otherwise protected activity lost that protection by the nature of the employee's conduct: (1) The place of discussion; (2) the subject matter; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by the employer's ULP's.

Here, the sole basis for the discipline (the level 3 warning and resultant unpaid suspension) was Van Leer's telephone conversation with a coworker pertaining to employees' sentiments about voting for or against union representation, in which she directly or indirectly expressed her own views on the matter. There can be no doubt that this constituted protected activity under Section 7 of the Act.

Accordingly, this is a single-motive case where there is no dispute as to the (protected) activity for which discipline was imposed. Prior to *Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014), discussed below, precedent would dictate that without question *Atlantic Steel* rather than *Wright Line* governs. See, e.g., *Santa Fe Tortilla Co.*, 360 NLRB No. 130, slip op. at 3 (2014); *Atlantic Scaffolding Co.*, 356 NLRB No. 113 at slip op. 5 (2011) ("[W]hen the conduct for which the employees are discharged constitutes protected activity, 'the only issue is whether [that] conduct lost the protection of the Act because . . . [i]t crossed over the line separating protected and unprotected activity." Citations omitted); *Aluminum Co. of America*, 338 NLRB 20, 22 (2002).

In *Felix Industries, Inc.*, 331 NLRB 144, 144–146 (2000), enf. denied on other grounds 251 F.3d 1051 (D.C. Cir. 2001), the Board found that statements made by an employee to a supervisor over the telephone should be analyzed under *Atlantic Steel*, specifically rejecting the application of *Wright Line* "where the conduct for which the Respondent claims to have discharged [the employee] was protected activity . . .," (Id. at 146), citing *Neff Perkins Co.*, 315 NLRB 1229, 1129 fn. 2 (1994), and *Mast Advertising & Publishing*, 304 NLRB 819 (1991).

The application of *Atlantic Steel* to a situation such as this one has been placed into question by *Triple Play Sports Bar and Grille***,** a case involving statements made by two employees in a Facebook discussion, in which they complained about errors in the employer's tax withholding calculations. The Board found *Wright Line*, rather than *Atlantic Steel*, to apply, stating (at slip op. at 4–5) (footnotes omitted):

> The clear inapplicability of *Atlantic Steel's* 'place of discussion' factor supports our conclusion that the *Atlantic Steel* framework is tailored to workplace confrontations with the employer. . . . No manager or supervisor participated in the discussion, and there was no direct confrontation with management. Although we do not condone her conduct, we find that Sanzone's use of a single expletive to describe a manager, in the course of a protected discussion on a social media website, does not sufficiently implicate the Respondent's legitimate interest in maintaining discipline and order in the workplace to warrant an analysis under *Atlantic Steel*.

The Board adopted the judge's finding that the discharges in question violated Section 8(a)(1) but under *Wright Line* rather than *Atlantic Steel*.

Locale-wise, the scenario here may be considered to fall somewhere between workplace and off-site since Fulton was at work, but Van Leer was not. I am inclined to view it as away from the workplace since no one other than Fulton was privy to the call. Moreover, no manager or supervisor participated in the phone call, and it is difficult to see how what was said therein interfered with "discipline and order in the workplace." Manager Murphy's conduct refutes any claim to the contrary: She did not stop when she passed by Fulton's desk during the phone call but instead continued on her way, and she initiated no communication with Fulton afterward.

In view of the uncertainty of which analysis the Board would find appropriate, I will analyze the case under both standards.

Atlantic Steel analysis

(1) Place of discussion.

As *Fresenius* indicates (slip op. at 6), if the place of discussion is one that is unlikely to disrupt production, i.e., a nonwork area, it favors continued protection. The Board also considers whether the comments were made in the presence of other employees and, if not, the location factor is favorable. *Fresenius*, id.; *Beverly Health & Rehabilitation Services,* 346 NLRB 1319,

1322 fn. 20 (2006). The brief phone conversation in no way interfered with the Respondent's business, and no other employees heard it. Under both criteria, location favors protection.

(2) Subject matter.

Van Leer talked to a coworker about employees backtracking on their support for the Union, with the election scheduled to begin the following day. Thus, the subject was one going to the heart of employees' rights to organize and to vote for or against representation in an NLRB election. Subject matter favors protection.

(3) Nature of the outburst.

Since Van Leer spoke to a coworker over the phone, "outburst" would not seem to be the best term, but the Respondent argues that her "profane and abusive language" properly subjected her to discipline under the prohibition against disruptive behavior.

Therefore, the most important single element here is the nature of Van Leer's conduct as she engaged in protected activity, more precisely, whether it was "sufficiently egregious" to remove her from the Act's protection. See *Coca Cola Puerto Rico Bottlers*, 358 NLRB No. 129, slip op. at 3 fn. 12 (2012); *Stanford Hotel*, 344 NLRB 558, 558 (2005).

The Board distinguishes between "cases where employees engaged in concerted actions that exceeded the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the conduct is so violent or of such character to render the employee unfit for further service.'" *Kiewit Power Constructors Co.,* 355 NLRB 708, 711 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011), citing *Prescott Industrial Products Co.*, 205 NLRB 51, 51–52 (1973). In *Kiewit*, the Board found protected remarks that were "intemperate" but simple, brief, and spontaneous reactions, distinguishing them from premeditated, sustained personal threats, or unambiguous or outright threats of personal violence. Id.; see also *Fresenius*, above at slip op. 6–7; *Beverly Health*, above at 1322–1323.

The use of profanities in and of itself does not ordinarily remove an employee from protection. Thus, in *Winston-Salem Journal*, 341 NLRB 124, 126 (2004), the Board determined that the conduct of an employee who cursed at a supervisor and "angrily pointed his finger at him" was not "so inflammatory as to lose the protection of the Act." The Board emphasized that the Act allows a certain degree of latitude to employees engaged in otherwise protected activity even when they express themselves intemperately.

And, in *Stanford Hotel*, above at 559, the Board found that an employee calling a supervisor "a f—ing son of a bitch" while angrily pointing a finger at him weighed against protection. Nevertheless, other factors weighed in favor of protection, and the Board concluded that the employee's conduct was protected.

Finally, in *Plaza Auto Center, Inc.*, 355 NLRB 493, 497 (2010), the Board found, inter alia, that an employee's standing up and pushing aside a chair did not amount to a threatening

gesture, even though the employee engaged in cursing and made a statement that if the owner fired him, he would regret it.

Based on the above precedent, I conclude that Van Leer's conduct was not sufficiently egregious to remove it from the Act's protection.

(4) Whether the outburst was in any way provoked by the employer's ULP's.

The last factor is provocation by the employer's ULP's. This does not require that the employer's conduct be explicitly alleged as a ULP so long as the conduct evinces an intent to interfere with protected rights. *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007); *Overnite Transportation Co.,* 343 NLRB 1431, 1438 (2004).

This factor is inapplicable since nothing suggests that Van Leer's conduct was triggered by any actions of the Respondent, and the "outburst" was made toward a coworker and not a manager or supervisor.

In summary, I conclude that three of the four *Atlantic Steel Co.* factors are applicable, that in the aggregate they weigh in Van Leer's favor, and that her behavior did not remove her conduct on March 19, from the protection of the Act. Therefore, under an *Atlantic Steel* analysis, the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Van Leer and issuing her a level 3 discipline.

Wright Line analysis

Without question, Van Leer called Fulton concerning employees voting for or against the Union in the upcoming election, and the Respondent was aware from the start of the purpose of the call—both Murphy's and Schmid's emails to Fabiyi expressly referred to the call pertaining to how employees would vote in the election. Thus, the elements of protected activity and employer knowledge are established.

As to animus, in the March 28 meeting, Fabiyi told Van Leer not to discuss her suspension with anyone else, or "it will be trouble for you," and in the April 8 meeting, he unlawfully told her not to discuss her level 3 discipline with coworkers, or "it could be trouble for you."

Several factors also support a finding of inferred animus. First, the Respondent gave Van Leer a level 3 discipline, rather than imposing lesser penalties as per the Respondent's progressive discipline system, which provides that such factors as the severity of the incident, frequency of the incident, and previous overall performance/behavior are among the factors considered in determining what level should be imposed. Van Leer had no prior disciplines of any kind, and the evaluation that she received after April 8 reflects that her supervisors considered her a good employee. An employer's failure to follow its own progressive discipline policies frequently indicates a hidden motive for the imposition of more severe discipline. *Fayette Cotton Mill*, 245 NLRB 428 (1979); *Keller Mfg. Co.*, 237 NLRB 712, 713–714 (1978).

Moreover, this was the first instance in which Van Leer was found to have engaged in disruptive behavior or any other kind of misconduct. The only evidence of any other employee receiving a level 3 discipline for disruptive behavior concerned an employee who had a previous discipline for bad behavior and had been put on a corrective action procedure, and her misconduct was at the workplace in the presence of other coworkers. Here, the conduct was in the nature of a phone call that Van Leer made when she was off duty and away from the Hospital, and there is no evidence that the call was disruptive. Indeed, Murphy did not stop when she passed by Fulton's desk during the call and, even according to her own written version of the event, an employee other than Fulton first came to see her afterward. Thus, I conclude that the discipline imposed in proportion to the offense raises another inference of improper motive. See *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, 1170 (2000); *KNTV, Inc.*, 319 NLRB 447, 452 (1995).

Fabiye did not attempt to obtain complete written statements from either Fulton or Van Leer concerning the contents of their telephone conversation, contrary to what he testified was his normal policy of asking for written statements, and below the level of professionalism that I would expect of an HR specialist employed by a hospital that is part of a chain of facilities. I have to presume that he would appreciate the importance of full documentation in this day and age. This might not amount to a failure to conduct a full and fair investigation (see *Hewlett Packard Co.,* 341 NLRB 492, 492 fn. 2 (2004); *Firestone Textile Co.*, 203 NLRB 89, 95 (1973)), but it does suggest that the Respondent did not have a genuine interest in obtaining from either Fulton or Van Leer a full written account of the contents of their conversation. One has to wonder why.

Finally, animus can be inferred from the Respondent's shifting rationales for suspending and then disciplining Van Leer. In the March 28 meeting, Fabiye stated and then confirmed that she was being investigated for calling several employees and telling them that she would "kick their asses;" if she had not, then she would be paid for the time for which she was being suspended. However, he admittedly engaged in no further investigation following the meeting, and at the April 8 meeting, mentioned nothing about that allegation. Instead, he limited his description of her misconduct to the telephone call, for which she was receiving a level 3 discipline and no pay for the period of her suspension. And, Cassard testified that Van Leer's communication with Fulton on March 20 played a role in deciding to issue her a level 3 discipline, but that communication is not mentioned as a reason either by Fabiye or in the written discipline itself. Such shifting of rationales is evidence that the Respondent's proffered reasons for disciplining Van Leer are pretextual. See *Approved Electric Corp.*, 356 NLRB No. 45 (2010) (citing *City Stationery, Inc.*, 340 NLRB 523, 524 (2003); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.").

Considering all of the above factors, I conclude that the General Counsel has established the last elements, of animus and of actions based thereon and thus met his initial burden of persuasion under *Wright Line.*

The next step in the analysis is determining whether the Respondent has met its burden of persuasion to show that it would have taken the same adverse action even in absence of the protected activity. Since this is not a dual-motive case, the sole focus of inquiry is determining whether the Respondent would have suspended Van Leer without pay and issued her a level 3 discipline had the phone call not constituted protected activity.

For a number of reasons, I conclude that the Respondent has failed to meet that burden. First, I again note the adverse inferences that I have drawn from the Respondent's failure to call Fulton as a witness or to show that it made reasonable efforts to secure her presence at trial, and its failure to call admitted agent Dugan. Secondly, as I previously explained, Cassard and Fabiye were not credible witnesses on many key points concerning the suspension and discipline. Perhaps the most glaring examples of this are Cassard's initial testimony that he could not recall if Fabiyi informed him that the phone conversation dealt with the Union, and Fabiye's testimony that the subject of the Union never came up in his March 28 meeting with Van Leer—testimony directly contradicted by his own notes of the meeting.

Finally, factors that I have considered as leading to inferences of animus also undermine the Respondent's ability to rebut the General Counsel's prima facie case of unlawful suspension and discipline: (1) The Respondent's shifting rationales for the suspension and discipline; (2) Fabiye's failure to ask Fulton or Van Leer to provide written statements, despite his testimony that it is his normal policy to ask for them; (3) the Respondent's failure to follow its progressive discipline policies; and (4) the severity of the penalty levied in proportion to the seriousness of the offense.

Accordingly, I conclude that under a *Wright Line* analysis, the Respondent violated Section 8(a)(3) and (1) by suspending Van Leer and issuing her a level 3 warning.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

   (a) Suspended Theresa Van Leer on March 28, 2014.

   (b) Issued Van Leer a level 3 discipline on April 8, 2014.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act: Told an employee not to discuss her pending investigation, suspension, or discipline with other employees.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, the Respondent shall make Van Leer whole for any losses, earnings, and other benefits that she suffered as a result of the unlawful suspension imposed on her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, NC-DSH, LLP d/b/a Desert Springs Hospital Medical Center, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, issuing warnings to, or otherwise discriminating against employees for engaging in activities on behalf of Service Employees International Union, Local 1107 or any other labor organization.

(b) Telling employees not to discuss their pending investigations, suspensions, or disciplines with other employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Theresa Van Leer whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and level 3 discipline of Theresa Van Leer, and within

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

3 days thereafter notify her in writing that this has been done and that the suspension and level 3 discipline will not be used against her in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 28, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 13, 2015

Ira Sandron
Administrative Law Judge

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discipline, or otherwise discriminate against you because you engage in activities in support of Service Employees International Union, Local 1107 or any other labor organization.

WE WILL NOT tell employees not to discuss their pending investigations, suspensions, or disciplines with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL make Theresa Van Leer whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to the suspension and level 3 discipline of Theresa Van Leer, and we will, within 3 days thereafter notify her in writing that this has been done and that the suspension and level 3 discipline will not be used against her in any way.

NC-DSH, LLP d/b/a DESERT
SPRINGS HOSPITAL MEDICAL CENTER
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-127971 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.